Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP L. KING,

Petitioner,

v.

GENE STUBBLEFIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I.

Did the court below violate this Court's decisions authoritatively setting the standard for granting a certificate of appealability in federal habeas corpus cases, in that reasonable jurists would find debatable or wrong the district court's denial of the petitioner's claim of ineffective assistance of counsel when he showed that trial counsel refused even to interview jail detainees who were the only witnesses to the conduct for which he was on trial (because it happened in a jail when no guards or visitors were present), and who would have testified he was not in the room where the conduct occurred, because of stereotypes about "prisoners" which this Court rejected in *Schlup v. Delo* and which were, in this case, false?

II.

Did the court below violate this Court's decisions authoritatively setting the standard for granting a certificate of appealability in that reasonable jurists would find debatable or wrong the district court's denial of relief from the petitioner's sentence of thirty years without parole based on its assertion that he did not present actual innocence as a "gateway" to consideration of procedurally barred claims or issues (when the invocation of the *Schlup* "gateway" appears on the face of the record), and the district court's proclamation that actual innocence can never be the basis of a claim for relief?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP L. KING,

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v.

GENE STUBBLEFIELD,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioner, Phillip L. King, prays the Court for its order granting a writ of certiorari to review the order of the court below.

Orders in Lieu of Opinions Below

The order of the court below summarily denying a certificate of appealability and dismissing the petitioner's appeal is unpublished (App. 1), as is its order denying rehearing (App. 17). The memorandum and order of the district court denying relief without an evidentiary hearing and denying a certificate of appealability, sua sponte and in advance, is also unpublished. (App. 2-16.)

Jurisdictional Statement

The order of the United States Court of Appeals for the Eighth Circuit summarily denying a certificate of appealability was entered on November 14, 2000. (App. 1.) The same court denied the petitioner's timely petition for rehearing with suggestion for rehearing en banc on December 20, 2001. (App. 17.) On March 12, 2001, JUSTICE THOMAS granted the petitioner an extension of time to file this petition through and including April 19, 2001. Thereafter he granted the petitioner's motion for the full sixty days allowed under Rule 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (c) of section 2253 of title 28 of the United States Code, as amended by the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Statement of the Case

In the Circuit Court of Jefferson County, the petitioner was convicted of attempted forcible sodomy and sentenced to imprisonment for thirty years without parole. Trial counsel did not call, or even interview, available witnesses who would have testified that another individual, David Coleman, committed the critical overt act on the basis of which the courts held that the prosecution made a formally submissible case on a theory of attempt, and that the petitioner was not even in

the room where the overt act occurred. Both state and federal courts have denied relief on the petitioner's claims of ineffective assistance of counsel.

On May 11, 1988, the petitioner was arrested on a charge of murder in the first degree and placed in the Jefferson County Jail. The courts first ordered him released on bond and then dismissed the case against him.

Before being released on bond, the petitioner was housed in "A Tank," a section of the jail closest to the office where the jailers congregated. Deputy Sheriff Charles Bennett testified that if an detainee had called for help from "A Tank," the jailers would have heard it. (T.Tr. 328.)[1]

On the morning of June 24, 1988, the jailers placed one Kevin Moore in "A Tank." Moore had been arrested on a felony charge of stealing fireworks the night before. Some of the men in "A Tank" thought that Moore had an "attitude" due to his remarks to them. Moore was wearing bikini underwear which they thought effeminate. (App. 56.) Some of the older men in "A Tank" began to harass Moore. By some accounts their behavior was encouraged by the jailers as a "scared straight" tactic. (App. 56.). Their harassment was of a sexual character. They asked Moore what he would do when he got to the Department of Corrections and prisoners demanded sexual favors from him. His answers appeared weak to

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[1]The transcript of the petitioner's trial is included in the two-volume appendix the petitioner's counsel in the district court submitted with the amended petition. It appears as pages 137-456 of volume I, and pages 457-570 of the consecutively paginated volume II.

them, so they accelerated the harassment. (App. 56 & 82-83.)

"A Tank" consisted of a common area (or bullpen) and four cells, called "Houses" or "Cellhouses." The latter cells were numbered "1" through "4." They were in a row, and faced out into the common area. Each of the cells had bunks for four men. Moore had been assigned to Cellhouse 4 with three older men, David Coleman, Dixie Godfrey, and Paul Pruett. At around 9:30 on the evening of June 24, 1988, Coleman and Godfrey were in the cell with Moore, giving him a hard time. A group of men including the petitioner were engaging in recreation in the common area. They heard noise coming from Cellhouse 4 and went over to the doorway of Cellhouse 4 to see what was going on there. The group came upon David Coleman telling Kevin Moore that he would have to "choose up," *i.e.*, select one of the two men in his cell with whom to have a homosexual relationship. Moore went along with this treatment and "chose" Dixie Godfrey.

After Moore had "chosen" Godfrey, the nonparticipants dispersed and went back to their recreation. A few minutes later, Godfrey called to the men in the common area and asked them to come over to the cell again. Several of them, including the petitioner, responded and again stood outside Cellhouse 4, looking in through the bars. Some of the men in Cellhouse 4 told Moore to take off his clothes; they did not threaten him with harm, but said that if he did not remove his clothes, they would remove them for him. (T.Tr. 162-65 (Moore).) At this time, Coleman had a bottle of lotion in his hand. (App. 56 & 82-83.)

Godfrey said to Moore, "Okay, do it." Moore removed his underwear and lay, face down, on one of the bottom bunks. Coleman told Moore to "hike his ass up in the air." When Moore raised his buttocks, Coleman took some of the lotion and applied it to Moore's buttocks. (App. 56 & 82-83).)

At this point, the petitioner, standing outside the cell, told Moore to put his clothes back on—that no one was going to do anything to him, that the men in the cell were just messing with him. As Moore was putting on his underwear, the men kept making fun of him. Some of them spat on him and laughed at him because he was wearing the bikini briefs. One of the men told him to go get himself cleaned up. As Moore walked to the shower, the petitioner, offered him a pair of his own boxer shorts and told Moore to put them on after his shower so that he would be dressed like the other men in the Tank. Moore did so.

Petitioner heard the men in Cellhouse 4 say that they did not want Moore back in the cell with them. When Moore came out of the shower, the petitioner told Moore that his cellmates were not going to let him back in the cell, and that he could either go to the jailers and get out of "A Tank" or exchange cells with someone. Petitioner considered the men in his own cell, Cellhouse 3, to be well-behaved and less of a threat to Moore. He offered to switch cells with Moore, and Moore accepted.

Unbeknownst to the petitioner, two other men also switched cells to spend the night locked in Cellhouse 3 with Moore and Phillip Sprock, the other man in the cell. Jonathan Deal and Kenneth McFadden went from elsewhere in "A Tank" to Cellhouse 3. McFadden, Deal, and Sprock

resumed and heightened the harassment of Moore, which continued noisily through the night. The men in Cellhouse 3 made Moore speak like a girl; they fashioned a pillowcase into women's clothing and made him wear it; they painted his fingernails and toenails. They put matches between his toes and lit them. They wrote obscene expressions on Moore's back with a black marker. ***Throughout this renewed, all-night harassment of Kevin Moore in Cellhouse 3, the petitioner, Phillip King, was locked in Cellhouse 4.*** (App. 56-57.)

At one point in the night-long harassment, Godfrey said that he did not "want" Moore, and "gave" him to the petitioner, saying "Skip can have you." The men in Cellhouse 3 wrote "Skip's Baby" on Moore's back. ("Skip" is a nickname for the petitioner.)

The jail staff was headquartered close by "A Tank," and they intermittently patrolled it. Moore did not seek help from the staff throughout the evening and night during which this harassment was taking place. Only in the morning, when Moore discovered the writing on his back, did he became hysterical and shout for the staff to get him out of that tank. As soon as he complained, he was removed from "A Tank."

Jail staff questioned Moore about the incidents. In the course of this "investigation," Jail Deputy Bennett showed Moore photographs of some of the men in "A Tank" for him to use to identify the men who harassed him, as he said he could not see who smeared the lotion on him. Bennett did not show him pictures of everyone in "A Tank": he did not show him a picture of David Coleman. (App. 49-51.) The staff questioned only the complaining witness and the four men who were

later accused of third-degree assault. The jailers on duty the previous evening (*i.e.*, during the lotion incident) do not appear to have been questioned, or else their statements did not support the charges against the men who were prosecuted in the matter.

Petitioner was released from the Jefferson County Jail on bond for the homicide charge on June 28, 1988. Jail staff prepared arrest warrants for several of the men in "A Tank" on the basis of the harassment of Moore, designating the offense as assault in the third degree. None of these warrants was ever executed.

On August 24, 1988, the Hon. Robert J. Curran, Associate Circuit Judge, held a preliminary hearing on the homicide case in which the petitioner had been named as an accused. Petitioner's counsel, Frank K. Carlson, attacked the prosecution's charge on multiple grounds, including improper venue, lack of causation, misidentification, and failure to adduce some evidence on each of the essential elements of the offense, especially mens rea. On August 24, 1988, Judge Curran dismissed the homicide case against the petitioner for insufficiency of the evidence.

Thereafter, the same prosecutor's office that had unsuccessfully sought to prosecute the petitioner for homicide charged him with *attempted forcible sodomy* in connection with the Kevin Moore lotion incident—the same incident concerning which the responsible law-enforcement officers had prepared arrest warrants for *third-degree assault*. Its theory was that the petitioner had forced Moore to disrobe, that he had been the person who placed the lotion on Moore's buttocks, and that the latter actions

constituted a "substantial step" toward sodomizing Moore. Frank Carlson represented the petitioner in this case as well.

The first two times the case against the petitioner went to a preliminary hearing, it was dismissed because Moore did not appear. Moore testified in a deposition that he was released on recognizance after spending about a month in jail. Moore testified that he had an "arrangement" with the prosecutor's office that they would drop the charges against him if he would testify against the petitioner. (T.Tr. 141.)

Carlson did not call the men who were in jail with the petitioner to testify that Coleman—rather than the petitioner—had placed the lotion on Moore's buttocks. Carlson had decided not to call the petitioner as a witness, because doing so would open the door to the prosecution's informing the jury that he had pled guilty to a prior sex offense and had served a term of imprisonment for it.

At the state post-conviction relief proceeding, Carlson testified that he did not call the other men from the jail because they would have testified they had "done time" with the petitioner. (Post-Conviction Relief Evidentiary Hearing Transcript at 75.) Carlson reasoned that this testimony would have allowed the prosecution to place the petitioner's prior conviction before the jury. (*Id.* at 75-76.) Carlson also believed that the other men in the jail would not be credible witnesses because they would have criminal records. (*Id.* at 78.) As a matter of fact, these assumptions were not true. (*E.g.*, App. 60.)

At trial, Carlson brought out on crossexamination of Moore the fact that he did not see the petitioner put anything on him or touch him. (T.Tr. 181.) Moore testified he merely believed that the petitioner did it because he could not see the petitioner at the time of the incident. He testified he believed that the "high-pitched" voice which he heard a few minutes before the smearing of the lotion belonged to the petitioner. Moore admitted that he did not know why he had said at his deposition that the petitioner was the one who rubbed the cream on his buttocks. (T.Tr. 179.) Moore admitted that he had not spoken with the petitioner on the day of the incident. (T.Tr. 100.) Moore admitted that the petitioner did offer to exchange cells and did indeed exchange cells with him after the incident. Moore admitted to being extensively coached in his testimony by the prosecution. He admitted that the prosecution promised that his felony stealing charge would be dropped if he cooperated in prosecuting the petitioner.

The prosecution introduced pictures taken of Moore's back the morning after the incident, reflecting the harassment in Cellhouse 3 the night after the incident with the lotion. (T.Tr. 247 & 312-14.) There was never any allegation that the petitioner had done this writing. (T.Tr. 181 (Moore).) The prosecution presented evidence about the harassment in Cellhouse 3 on June 25, when the petitioner was locked in another cell. (T.Tr. 247 (Moore) & 312 (Bennett).)

In light of the petitioner's prior guilty plea to a sex offense, a guilty verdict in this case would subject him to imprisonment for thirty years to life without eligibility for parole. Mo. Rev. Stat.

§§ 558.016, 558.018, 558.021, 558.036.4, 564.011 & 566.060.2. The trial judge prevented Carlson from informing the jury of the petitioner's sentencing exposure.

Petitioner was found guilty. The trial court sentenced him to imprisonment for thirty years without parole—the minimum sentence available under the applicable statutes.

Under the Missouri post-conviction relief (PCR) régime at the time, the petitioner litigated his claims of ineffective assistance of counsel in the trial court while the courts held his direct appeal in abeyance. During his PCR proceeding, a man who had been in the jail at the time of the incident and had seen who smeared the lotion on Moore's buttocks—and was willing to testify about it—was in prison out-of-state; PCR counsel, a state public defender, failed to procure this witness's attendance at the hearing. The trial court denied post-conviction relief.

Petitioner appealed. Retained consolidated-appeal counsel did not request oral argument, did not file a reply brief, and did not notify the petitioner or his family when the Missouri Court of Appeals affirmed the conviction. The latter failure prevented the petitioner from filing an application for transfer to the Missouri Supreme Court.

Petitioner filed a pro se petition for a writ of habeas corpus. Counsel were retained, and filed an amended petition with exhibits. (App. 18-60.) After further briefing and submission of exhibits, the district court denied relief without an evidentiary hearing. (App. 2-16.) In the same order, it announced, sua sponte and in advance,

that it would deny a certificate of appealability. (App. 15-16.)

Petitioner sought a certificate of appealability from the court below. It denied the certificate summarily. (App. 1.) Petitioner sought rehearing and rehearing en banc, but the court below denied them summarily. (App. 17.)

Argument

I. **In summarily denying a certificate of appealability, the court below decided a substantial federal question in a way that conflicts with this Court's decisions in *Slack v. McDaniel* and *Barefoot v. Estelle*, in that reasonable jurists could differ with, or would find debatable or wrong, the district court's denial of relief on the ground that trial counsel was ineffective for failing to interview any witnesses—including alibi witnesses—and for failing to present exculpatory evidence.**

A. A certificate of appealability is available to obtain appellate review of the denial of a writ of habeas corpus whenever the petitioner shows that reasonable jurists could differ with the district court's decision, or would find it debatable or wrong.

A federal habeas corpus petitioner whose petition has been denied in the district court is entitled to a certificate of appealability under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), on "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). In

authoritatively applying this statutory language, this Court has held that "[e]xcept for substituting the word 'constitutional' for the word 'federal,' the AEDPA amendments to section 2253 are a codification of the certificate of probable cause (CPC) standard announced in *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983): "[W]e give the language found in 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word 'constitutional'." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

Petitioners and the defense bar have understandably been critical of certain provisions of AEDPA, and even of some judicial decisions concerning it. But President Clinton's official statement why he was not vetoing the bill (reprinted in 2 J. Liebman & R. Hertz, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE at 1711-14 (3d ed. 1998)), and the overall course of this Court's decisions construing it—from *Felker v. Turpin*, 518 U.S. 651 (1996), decided when the ink was barely dry on the President's signature, through *Williams v. Taylor*, 529 U.S. 362 (2000), *Slack v. McDaniel*, and *Artuz v. Bennett*, 531 U.S. 4 (2000)—have repudiated the most extreme efforts of the political branches to use AEDPA to avoid judicial review of their federal constitutional violations. This line of decisions should come as no surprise, as the rejection of these efforts harmonizes AEDPA with the Suspension Clause (U.S. Const. art. I, § 9), the Due Process Clause of the Fifth Amendment, and the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Under *Barefoot v. Estelle*, a petitioner who has not prevailed in the district court is entitled to an appeal if he shows that some reasonable jurist—

any reasonable jurist—could have resolved one or more of the federal grievances differently:

> In requiring a "question of some substance", or a "substantial showing of the denial of [a] federal right", obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate [1] that the issues are debatable among jurists of reason; [2] that a court could resolve the issues [in a different manner]; *or* [3] that the questions are "adequate to deserve encouragement to proceed further." [*Id.* at 893 (internal citations omitted; emphasis supplied).]

Thus, unlike an appeal per se, the petitioner's application did not require the court below to decide whether the district court erred, clearly erred, or abused its discretion as to any of the issues the petitioner advanced as requiring a certificate of appealability. Petitioner's burden was substantially lighter: it was not to show that the district court was necessarily wrong, but only to show that it was not necessarily right.

In ruling on an application for COA, a court must resolve all doubts in favor of the appellant. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); *see Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991). Grant or denial of a COA is not discretionary: if the petitioner has made the showing required in *Barefoot* and codified in AEDPA, the certificate must issue. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (reviewing the denial of a certificate of probable cause by a court of appeals). *See also Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (WHITE, Circuit Justice) (judge or

justice is "compelled" to issue certificate when Court has already granted certiorari in other case raising the same constitutional question, indicating that the constitutional question the certificate applicant has presented is "substantial").

To qualify under *Barefoot v. Estelle*, an appeal must raise at least one issue as to which the petitioner makes a "substantial showing of the denial of [a] federal right." *Barefoot*, 463 U.S. at 880, 893; *see also Lozada v. Deeds*, 498 U.S. at 432; *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994). In defining the "substantial showing" standard, the Supreme Court has admonished the other federal courts that they may not deny applications for certificates of probable cause solely because they have already denied a petition on the merits: "[o]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n.4; *Lozada*, 498 U.S. at 432. A certificate must issue if the petitioner "[d]emonstrate[s] that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot*, 463 U.S. at 893 n.4 (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)).

Because the question whether reasonable jurists could differ with a district court's resolution of an issue is a question of law or a mixed question of law and fact, any district-court denial of a certificate is entitled to no deference at all. In this case, however, the district court was not content with denying relief; it reached out to insulate its own decision from any review by

denying a certificate of appealability before the petitioner had requested one. The district court's summary sua sponte denial of a certificate of appealability, issued simultaneously with the denial of relief per se, undermines the impartial observer's confidence that justice has been done in this case.

Having denied relief, the district court simultaneously denied the certificate sua sponte *in one sentence*:

> Because the petitioner cannot make a substantial showing of a denial of a constitutional right, the Court *will not* issue a certificate of appealability. See Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 119 S.Ct. 89 (1998) (substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issue differently, or the issues deserve further proceedings.") [App. 15-16 (emphasis supplied).]

The district court's summary sua sponte denial *in advance* did not allow the petitioner's counsel to identify issues that the petitioner believed to require issuance of a certificate. It said it would deny the certificate without conducting a *Barefoot* inquiry as to the issues one-by-one, rather than all at once in a conclusory fashion. Although it recited part of the legal standard for granting a certificate, it did not demonstrate a scintilla of analysis to apply this standard to the facts of this case.

It violates the principle that ours is a government of laws, and not of men, to allow a governmental body to make a decision and at the

same time insulate it from review. Denying a certificate of appealability in a case involving a sentence of thirty years without eligibility for parole without providing the legal or factual bases asserted to support the denial deprives a petitioner of liberty without notice and an opportunity to be heard. "Notice" and the "opportunity to be heard" in a manner "appropriate to the nature of the case" are the hallmarks of due process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1984). Coupled with the summary denial by the court below, the federal district court's sua sponte denial of a certificate simultaneously with its denial of relief is an independent constitutional violation internal to the federal courts, and is such a departure from the norm of judicial proceedings as to require this Court's intervention.

In addition, the manner in which the district court denied a certificate impeaches the substance of the denial. What the district court did invades the province of counsel in selecting which issues to prioritize in seeking review once it is known that relief has been denied. Counsel and the petitioner have knowledge of the case and of the petitioner's priorities in the case that any court simply cannot have.

For these reasons, the petitioner came before the court below with a momentum reinforcing the law on liberal availability of appellate review as Congress has mandated it, as the President relied on in signing the statute, and as this Court has consistently restated it. It nonetheless denied the certificate summarily.

B. Reasonable jurists could differ with the district court's denial of relief on the ground that trial counsel was ineffective for failing to interview any witnesses, including alibi witnesses, and for failing to present exculpatory evidence.

In the district court the petitioner presented unrefuted evidence that his trial counsel did not interview a single witness, though the petitioner proposed several to trial counsel; that these witnesses were readily available; that they would have testified; and that their testimony would have proved the petitioner did not commit the act with which the prosecution had charged him. Despite this clear record, the district court held that trial counsel's failure to interview readily accessible witnesses as the petitioner requested was not ineffective.

The district court's holding on this issue is *at least* one about which reasonable jurists could differ. *Slack*, 529 U.S. at 483-84, *citing Barefoot*, 463 U.S. at 893. Further, the decisions of the Missouri state courts rejecting the petitioner's ineffective assistance claims are contrary to established law, requiring issuance of the writ. *Williams v. Taylor*, 529 U.S. at 389-90.

1. Reasonable jurists would find debatable or wrong the district court's refusal to apply this Court's decision in *Schlup* to trial counsel's refusal to investigate exculpatory witnesses in a jail case because they were in jail.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, the established legal standard entitles a petitioner to relief when he or

she shows that his or her attorney's performance was deficient and that there is a "reasonable probability" the deficient performance prejudiced his defense, as to either the verdict or the sentence. On remand after this Court reversed the decision of the court below in *Schlup v. Delo*, 513 U.S. 298 (1995), another judge of the district court has recognized "that 'the decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.'" *Schlup v. Bowersox*, 1996 U.S. LEXIS 8887 at *39 (E.D. Mo. May 2, 1996) (Hamilton, J.) (granting petition) (citation omitted).

In *Schlup*, after remand from this Court—and applying its teaching—another judge of the district court rejected the trial counsel's explanation that he did not interview witnesses who were actual convicts rather than, as here, pretrial detainees, based on his speculative belief that, because of their inmate status and possible fear of retaliation by other inmates, these witnesses would not be reliable or credible. *Id.* at *43. "Trial counsel did not have a sufficient basis for believing that investigating [inmate] eyewitnesses would not benefit the defense." *Id.* at *48.

The same situation exists in this case: the petitioner's trial counsel gave a weak excuse for not interviewing readily available witnesses.

Trial counsel's admitted failure even to interview alibi witnesses necessarily made his performance fall far "short of the diligence that a reasonably competent attorney would exercise under similar circumstances." *Lawrence v. Armontrout*, 900 F.2d 127, 129 (8th Cir. 1990)

(admission by trial lawyer that he failed to attempt to interview potential alibi witnesses rendered the lawyer's conduct ineffective). It is well established that trial counsel's failure to interview crucial witness can only be considered ineffective. For example, in *Schlup*, the district court held that "[w]ithout even personally interviewing the eyewitnesses, trial counsel 'was ill equipped to assess [their] credibility . . . despite the factors tending to impugn [their] credibility.'" 1996 U.S. LEXIS 8887 at *55 (E.D. Mo. May 2, 1996), *quoting Bryant v. Scott*, 28 F.3d 1411, 1417 (5th Cir. 1994) (trial counsel's decision not to interview inmate alibi witnesses fell below objective standard of reasonableness because, without such interviews, "'[trial counsel] was ill-equipped to assess his credibility or persuasiveness as a witness, despite objective factors [such as prior convictions] tending to impugn [such witness'] credibility'") (citations omitted).

Newly available evidence clearly demonstrated the prejudice to the petitioner. He could have presented a strong defense to the charge if his trial counsel had called these witnesses to testify, demonstrating "that there is a reasonable probability that but for counsel's unprofessional errors, the result . . . would have been different." *Strickland*, 466 U.S. at 694. *See Schlup*, 1996 U.S. Dist. LEXIS 8887 at *57 (citation omitted) (emphasis added) ("In determining whether counsel's errors prejudiced the defense, the court 'must consider the totality of the evidence before the judge or jury.' "In this case, *as a result of trial counsel's 'unprofessional errors,' the jury did not hear inmate testimony that Petitioner was not present at the scene of the crime.*" As a result, "there is a reasonable probability that, but for trial

counsel's failure to interview eyewitnesses, the result of the proceeding would have been different." *Id.* at *70, *citing Strickland*, 466 U.S. at 694.

The similarities between these precedents and the petitioner's case demonstrate that his claim meets the *Barefoot* standard codified in AEDPA.

The unrefuted facts are that the petitioner's trial counsel rationalized his failure to interview *any* witnesses by speculating—without any factual support—that the alibi witnesses the petitioner told him about would not have been credible or reliable because of (1) their criminal histories, (2) trial counsel's erroneous belief that these witnesses knew the petitioner from a prior incarceration, and (3) trial counsel's apparent belief that the prosecution's case against the petitioner was so weak that he would not be convicted. (PCR Evid. Hrg. Tr. 78-79.)[2]

Trial counsel's conduct substantially demonstrates the denial of a constitutional right to effective assistance of counsel that fatally prejudiced the petitioner's defense. This Court's mandatory precedent dictated that either the district court or the court below should have granted a certificate of appealability.

2. Reasonable jurists would find debatable or wrong the district court's deference to state court "findings."

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[2]The transcript of the evidentiary hearing in the petitioner's state post-conviction relief action appears as pages 607-746 of volume II of the appendix his counsel in the district court submitted with the amended petition.

In *Williams v. Taylor*, 529 U.S. at 386, this Court directed federal habeas corpus courts to "make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a 'mixed question' that rests on a finding of fact." *Id.* at . Like previous law, *Williams* requires federal courts to review very carefully the state court legal determinations of fact, and to issue the writ if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, or if the state court decision conflicted with or applied federal law in an unreasonable way. *Id.*

Accordingly, under AEDPA "the parameters of this inquiry [into the 'reasonableness' of trial counsel's strategy] are not limited by the presumption of correctness afforded factual findings under 28 U.S.C. § 2254" because the "reasonableness of that strategy is a mixed question of fact and law to which the presumption of correctness does not attach." *Berryman v. Morton*, 100 F.3d 1089, 1096, 1103-1105 (3d Cir. 1996); *accord, Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("whether an attorney's tactical decision is a reasonable one, falling within the range of professional competence, is an issue of law reviewed *de novo* by this court").

In this case the district court accepted without question the decision of the state court that the petitioner received effective assistance of counsel and, apparently, did not independently examine those determinations of federal law. *See Williams*, 529 U.S. at 387 ("it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the

independent judgment of the federal court, in error.") The state court based its decision on the following facts and testimony: trial counsel knew that the assault occurred in a holding tank holding approximately twelve pretrial detainees or other persons, including the petitioner, making all of these pretrial detainee witnesses or potential witnesses; trial counsel admitted the petitioner specifically requested that he contact these witnesses; trial counsel admitted that he did not contact any of these witnesses, and that these witnesses would have testified that they did not see the petitioner assault the victim; trial counsel admitted that he failed to contact the petitioner's doctor, even though he knew of the petitioner's back injury, which required the wearing of a back brace at the time of the incident. (PCR Evid. Hrg. Tr. 77-81.) Two of witnesses who testified at the post-conviction relief hearing stated that the petitioner was not involved in the harassment of the victim. (PCR Evid. Hrg. Tr. 31-32, 34, 45, 49-50, 54-56 & 59.) Despite this clear evidence of prejudicially deficient representation, the district court concluded that the state court's decision was correct.

On the basis of the evidence the petitioner has adduced here, and this Court's decisions he has cited here, the state court's resolution of claims and issues against the petitioner is contrary to, or involved an unreasonable application of, federal law. 28 U.S.C. § 2254(d); *Williams, supra.* In reviewing the state court's decision, the district court did not make the "case-by-case examination of the evidence" that *Strickland* requires. *Williams,* 529 U.S. at 391, *citing Wright v. West,* 505 U.S. 277, 308 (1992). The state-court proceedings provide

no basis for denying relief, let alone for denying a certificate of appealability.

Neither the district court's order nor the state-court order on which it relied followed the substantive standard this Court and the court below have established. The judgment must be reversed.

II. The court below decided a substantial federal question in a way that conflicts with this Court's decisions in *Slack v. McDaniel* and *Barefoot v. Estelle* in summarily denying a certificate of appealability, in that reasonable jurists would find wrong or at least debatable the district court's denial of relief on the basis of its assertions that the petitioner did not present actual innocence as a "gateway" to consideration of procedurally barred claims or issues, and that actual innocence can never be the basis of a claim for relief.

The district court dismissed the petitioner's demonstrated innocence in less than one page. (App. 15.) It mischaracterizes the petitioner's demonstration of actual innocence as limited to a "free-standing claim" to the exclusion of a "gateway" to federal judicial consideration of a defaulted, abusive, or successive claim. *E.g., Schlup v. Delo.* The court below denied a certificate of appealability to review this error. In doing so, it violated this Court's mandatory precedent on the standard for granting a certificate of appealability.

A. Reasonable jurists could differ with the district court's assertion that "[t]his is not a case in which petitioner is attempting to use a claim of actual innocence to avoid a procedural bar in order to present other constitutional claims."

A part of the petitioner's claim that his trial counsel was ineffective for failing to interview and call exculpatory witnesses was that trial counsel did not interview and call the witness who submitted an affidavit under seal stating that the petitioner was not one of the persons he saw harassing Moore. The district court held that this portion of the claim was procedurally defaulted, in that state post-conviction relief counsel did not procure the attendance of this witness at the state post-conviction relief evidentiary hearing, and the state courts therefore ignored the substance of the witness's evidence. (App. 13 n.2.) At the time of this hearing, the witness was incarcerated out-of-state. Petitioner's post-conviction relief counsel—a Missouri state public defender—failed to secure the witness's appearance by a writ of habeas corpus ad testificandum or otherwise. Only after much effort by retained counsel in this federal habeas corpus proceeding was the petitioner able to secure and present new evidence (the affidavit from this witness) that the petitioner is, in fact, innocent. The affidavit, filed under seal, is part of the file from the district court. (App. 86-89 & 96.)

Under *Schlup*, this evidence of the petitioner's actual innocence is a "gateway" through which he may pass, notwithstanding PCR counsel's failure to obtain the presence of this witness at the evidentiary hearing, and the state court's preclusion of the underlying claim on this basis.

513 U.S. at 314. The underlying constitutional claim of ineffective assistance of counsel is demonstrated by trial counsel's failure to interview and present at trial an alibi witness. In light of the evidence of actual innocence, the merits of this Sixth Amendment claim are not precluded, and he may receive relief under it in federal habeas corpus.

Petitioner's district-court counsel made clear that the invocation of actual innocence had as one of its purposes the overcoming of a procedural default. In the traverse, counsel invoked it as a "gateway," citing *Schlup*:

> To the extent this Court may otherwise decide that it cannot reach the merits of King's ineffective assistance of counsel and/or, appellate counsel claims, *he has presented sufficient evidence to pass through the Schlup gateway of procedural actual innocence* based on the affidavits filed herewith and, the evidence presented at his PCR hearing. Based on such evidence, which "bec[a]me available after trial," "'it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence.'" [App. 76 (emphasis supplied; citations omitted).]

Counsel *also*, and *separately*, invoked the discussion in *Herrera v. Collins*, 506 U.S. 390 (1993), that suggests the existence of a "the more onerous 'actual innocence' standard" under which newly discovered evidence may entitle a petitioner to relief when it is "unquestionably" establishes his or her innocence. (App. 76.) They distinguished this use of actual innocence from the *Schlup* "gateway" concept: "The trial in Petitioner's case

was riddled with constitutional error. *Even if it were not*, he is nonetheless entitled to habeas relief under the more onerous 'actual innocence' standard" in *Herrera*. *Id.* (emphasis supplied). Americans have a right to expect more of their courts than willful blindness to one constitutional principle because a litigant invokes another constitutional principle on the same page, as if one's literacy degraded as one ascended the judicial hierarchy.

B. Reasonable jurists could differ with the district court's holding that a "freestanding" claim of actual innocence can never be cognizable in federal habeas corpus.

In its one-page dismissal of the petitioner's evidence of actual innocence, the district court cites dictum from the decision of the court below in *Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996), for the proposition that "a free-standing claim of actual innocence*.*.*.*is not cognizable in habeas corpus." (App. 15.) The language appears in the text of *Meadows*, but the district court had just previously held that the material asserted in support of actual innocence was *not*—as Mr. Meadows contended—newly discovered evidence. 99 F.3d at 282.[3] In any event, reasonable

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[3]The court below limits *Schlup v. Delo*, 513 U.S. 298 (1995), to claims of newly discovered evidence. *See, e.g., Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001). It did so in *Lee v. Kemna*, 213 F.3d 1037, 1039 (8th Cir. 2000), and this Court granted certiorari in response to a pro se petition. *Lee v. Kemna*, No. 00-6933 (U.S. Feb. 26, 2001). This Court could well reverse the court below in *Lee* because anyone who has practiced in Missouri state courts knows the courts there do not regularly adhere to and strictly enforce the rules the respondent held out as the basis for a procedural default

jurists could differ, and have differed, with the proposition for which the district court cites *Meadows*.

These reasonable jurists include at least a majority of the Members of this Court in *Herrera*, 506 U.S. at 419-27 (O'CONNOR, J., concurring, with whom KENNEDY, J., joined, who would have held that actual innocence states a claim cognizable in federal habeas corpus, but that Mr. Herrera had not made a successful one), 430-46 (BLACKMUN, J., dissenting, with whom STEVENS & SOUTER, JJ., joined)—a decision the district court cited as precluding relief on this ground. Although Mr. Herrera lost on the facts before this Court, at least five Justices supported the proposition that actual innocence is *more* than a "gateway" to allow consideration of defaulted, abusive, or successive claims.

The crucial opinion of JUSTICE O'CONNOR would require that federal habeas corpus relief on the basis of actual innocence be "reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of "actual innocence"' that cannot be presented to state authorities." 506 U.S. at 426, *quoting* the CHIEF JUSTICE's opinion, *id.* at 417. JUSTICE SCALIA explains that his concern

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barring federal review of Mr. Lee's constitutional grievance—one of the questions presented in Mr. Lee's petition, on which this Court's grant of certiorari was plenary. In light of the fact that this Court could, instead, have granted certiorari to correct the efforts of the court below to limit *Schlup*—another of the questions presented in *Lee*—this Court would do well to grant certiorari, vacate the order of the court below, and remand for further proceedings in light of its grant of certiorari in *Lee*, or—if it acts on this petition after the decision in *Lee*—for further proceedings in light of its opinion.

about the risk to judicial resources arises in capital cases, where he would "confidently" predict that claims of newly discovered evidence of actual innocence would become "routine and even repetitive." *Id.* at 428-29. But this petitioner is an innocent man who wants the speediest relief consistent with accuracy; he has no incentive to file one action after another in order to cheat the hangman.

The reasonable jurists who have already differed with the district court's summary rejection of this aspect of the petitioner's third ground for relief also include several panels of the court below.[4] The court below did not simply make a mistake in one case—it did—but is failing to apply a body of law this Court has prescribed to assure a minimum of decency in a criminal "justice" system fraught with pandering to wrath and prejudice and with incompetence promoted as "strategy."

In light of the solemn expressions of constitutional principles by this Court and the decisions in other cases by the court below itself, one cannot credibly claim that the law is all one way on the issue whether the Constitution tolerates the execution or imprisonment for thirty

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[4]*E.g.*, *Lewis v. Erickson*, 46 F.2d 1361, 1362 (8th Cir. 1991) (continued custody after recantation of key witness violates due process), *citing Sanders v. Sullivan*, 863 F.2d 218, 224-25 (2d Cir. 1988); *Mastrian v. McManus*, 554 F.2d 813, 822-23 (8th Cir.), *cert. denied*, 433 U.S. 913 (1977) (due process requires new trial in light of newly discovered evidence when its introduction would probably lead to acquittal). *See also Dumond v. Lockhart*, 885 F.2d 419 (8th Cir. 1989) (*Dumond I*), *appeal after remand*, 911 F.2d 104 (8th Cir. 1992) (*Dumond II*); *Drake v. Wyrick*, 640 F.2d 912, 914 (8th Cir. 1981).

years without parole of an innocent person. Reasonable jurists have in fact differed over it. The court below erred in violation of this Court's decisions in denying his application.

This case does not involve millions of dollars in shares of stock; it does not involve armies and navies; it does not involve tawdry intrigue in high places. It involves the question whether a judicial system can tolerate the imprisonment for thirty years without parole of a man whom the system knows to be innocent. It is a simple question of right and wrong.

Conclusion

WHEREFORE, Phillip L. King prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

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